IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12167 of 2000

with

CIVIL APPLICATION NO. 11927 OF 2001 IN

SPECIAL CIVIL APPLICATION NO 12167 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

LEGAL HEIRS OF DHANPAL JAYAN- TILAL SHAH & SUKETU J SHAH

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 12167 of 2000

MR MIHIR H JOSHI for Petitioners No. 1-1/4

Ms. Sen, AGP for Respondents No. 1-3

..... for Respondent No. 4

RULE SERVED for Respondents No. 4/1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 05/11/2001

ORAL JUDGEMENT

Heard learned advocate Mr. Joshi for the petitioners and Ms. Pandit, the learned AGP for the respondent authorities. Respondent no.4 has been served with a notice of rule but no appearance has been filed on his behalf.

In this petition, rule was issued by this Court and interim relief in terms of para 18 (C) of the petition was granted on 23.1.2001 on a condition that the petitioner shall not transfer, alienate or part with the possession of the land in question or any part thereof in any manner whatsoever and shall not use the said land for any purpose other than the agricultural purpose. In this matter, on behalf of the respondent authorities, affidavit in reply has been filed by One D.A. Shah, prant Officer, Gandhinagar.

In this matter, the petitioner has filed the civil application no. 11927 of 2001 for modification of the interim order dated 23.1.2001 and the said civil application was notified for hearing. However, considering the facts and circumstances of the case and request of the learned advocate for the petitioner, the main petition was taken up for hearing today itself.

By way of this petition, the petitioners have challenged the order dated 28th October, 1997 passed by respondent No. 3 as well as the order passed by the respondent No. 2 dated 29th September, 2000.

The petitioners entered into sale deed with respondent no.4 for sale of the land bearing survey no. 74/2/A admeasuring 214 sq. mtrs. situated at village Bhat, taluka district Gandhinagar on 24th June, 1974. According to the petitioner, said sale deed was registered in the office of the Sub Registrar, Gandhinagar at Registration No. 617 and accordingly, entries were made in the revenue record vide entry no. 1261 dated 14.6.1978. That the petitioners were put in possession of the land in question by the respondent No.4 pursuant to the said sale deed and even on the date of filing of the petition also, the petitioners were holding the possession of the said land and are also paying the taxes of the said land. According to the petitioners, due to the death of Shri Suketu J. Shah on 5th February, 1982, names of petitioners no. 2/1 to 2/4 were also entered in the village form no.6 and entries were made accordingly. Thereafter, in the year 1997, the

petitioners received notice dated 30.6.1997 calling upon the petitioners personally on 22nd July, 1997 to explain as to why the proceedings under section 9 of the Prevention of Fragmentation and Consolidation of holdings Act, 1947 should not be initiated against them as well as respondent No.4. The petitioners have also pointed out that the petitioners as well as respondent no.4 also were called upon by respondent no.3 to face the proceedings under sec. 9 of the Fragmentation Act for sale agreement entered into in the year 1974 after a period of about 23 years or so, on 12th august, 1997. Detailed reply was submitted by petitioner no.2/1 to the said show cause notice mentioning the fact that because of the land acquisition proceedings, the disputed land has remained with the petitioners as well as respondent no.4. It was also mentioned that in view of the circular dated 18th July, 1990, disputed land was exempted from the provisions of the Act and also that as the notice was issued after these many years, notice was bad and illegal and the same was required to be set aside. According to the petitioners, inspite of such a detailed reply submitted by the petitioners, the respondent No.3 has, by order dated 20th October, 1997, without considering the facts and circumstances of the case and also in total disregard to the fact that the provisions of the Act would not apply to the disputed land in view of the proceedings under the Land Acquisition Act as well as under the Urban Land (Ceiling and Regulation) Act, 1976. Against the said order, the petitioners approached the respondent No.2 Additional Secretary (Appeals), Revenue department, Gandhinagar by filing revision application no. 42 of 1997 wherein all the details were given with necessary facts and record. However, the revisional authority has, without considering the facts and details given by the petitioners in their revision application, rejected the revision application and confirmed the order dated 20th October, 1997 by order dated 29th September, 2000 and, therefore, the petitioners have approached this Court by way of this petition challenging both the orders dated 20th October, 1997 as well as the order dated 29th September, 2000 passed by the revisional authority.

During the course of hearing, learned advocate Mr. Joshi appearing for the petitioners has submitted that both the authorities have not considered important aspect of the matter that the proceedings under section 9(1) of the fragmentation Act were initiated after a period of more than twenty three years and, therefore, there was delay in exercising the powers. According to him, the authorities below have not considered that there was unreasonable delay in exercise of the suo motu powers

by the authority. He has submitted that the revisional authority has not considered the law laid down by this Court as well as the apex court in series of decisions. He has also submitted the transaction of the land in question was entered into by executing registered sale deed as stated earlier and pursuant thereto, names of the purchasers were mutated and were certified long before the issuance of the first show cause notice and on the basis of the said sale deed, the possession has also been handed over to the petitioners by respondent No.4. Therefore, he has submitted that there was no any breach of the provisions of the Fragmentation Act as alleged. He has also submitted that the Circle Inspector and the Deputy Collector, respondent No.3 herein has not considered these facts while passing the order dated 20th October, 1997. According to him, the revisional authority has also not considered the contentions raised by the petitioners in revision and has mechanically confirmed the order passed by the Circle Inspector & Deputy collector. He has relied upon the decision of this court in case of Ranchhodbhai Lallubhai Patel versus State of Gujarat and others reported in 1984 (2) GLR 1225. He has also relied upon the another decision in case of Punabhai Dhedubhai Baraiya versus Patel Chhaganbhai Parshottamdas and another reported in 1983 (2) GLR page 1165 as well as the decision in case of Patel Chhotabhai Shankerbhai v. Patel Shantabhai Narsibhai reported in 1975 GLR 247. He has also relied upon the decision of this court in case of Mohamad Kavi Mohamad Kavi versus Fatmabai Ibrahim reported in (1997) 6 Supreme Court Cases 71. He has also relied upon the decision of the Full Bench of this Court in case of Jadav Prabhatbhai Jethabhai v. Parmar Karsanbhai Dhulabhai reported in 2001(1) GLR 16.

Relying upon the aforesaid decisions, he has submitted that there was no breach of section 9(2) of the Fragmentation Act as alleged. According to him, however, this aspect of the matter was not considered by the authorities below while considering the matter. He has submitted that the aspect of delay also has not been taken into consideration by the authorities and, therefore, orders passed by the authorities below are illegal and required to be quashed and set aside.

Learned Asstt. G.P. Ms. Pandit appearing for respondent No. 1 and 2 has submitted that the circle inspector and the Deputy Collector, was right in initiating action under section 9 of the Fragmentation Act for the breach of section 7 thereof since no prior permission was obtained by the petitioner before

completing the said transaction and, therefore, according to her submission, such transaction between the parties was nullity and the authority was justified in exercising the suo motu powers under the provisions of the Fragmentation Act and since the transaction was nullity, then, the authority can initiate such proceedings at any time and at any stage by exercising suo motu powers. In support of her contentions, she has relied upon the following decisions;

(1) Saburbhai Hemabhai Chauhan versus State of Gujarat and Others reported in 2000(1) GLH 580.
(2) State of Orissa and others versus Brundaban Sharma and another reported in 1995 Supp (3) Supreme Court Cases 249.

Relying upon the aforesaid decisions, she has submitted that when no period of limitation is prescribed under the Act itself, revisional powers should be exercised by the revisional authority within reasonable period and when the transaction is non-est or nullity, then, the authority is justified in initiating such proceedings even after the period of twenty three years and thus, since the transaction of the land in question was nullity and void ab-initio, the question of delay in initiation would not come in the way of the authorities for initiating the proceedings. She has submitted that the void transaction cannot confer any right upon the petitioners and, therefore, validity of such orders can be examined and considered by the authorities at any stage and at any time while exercising the suo motu powers. She has submitted that the question of 27 years' delay was examined by the apex court in the aforesaid decision.

I have considered the submissions made by the learned advocates for the respective parties. As per the averments made in the memo of petition, the petitioners entered into sale deed with respondent no.4 for sale of the land bearing survey no. 74/2/A admeasuring 214 sq. mtrs. situated at village Bhat, taluka district Gandhinagar on 24th June, 1974. According to the petitioner, said sale deed was registered in the office of the Sub Registrar, Gandhinagar at Registration No. 617 and accordingly, entries were made in the revenue record vide entry no. 1261 dated 14.6.1978. That the petitioners were put in possession of the land in question by the respondent No.4 pursuant to the said sale deed and even on the date of filing of the petition also, the petitioners were holding the possession of the said land and are also paying the

taxes of the said land. According to the petitioners, due to the death of Shri Suketu J. Shah on 5th February, 1982, names of petitioners no. 2/1 to 2/4 were also entered in the village form no.6 and entries were made accordingly. Thereafter, in the year 1997, the petitioners received notice dated 30.6.1997 calling upon the petitioners personally on 22nd July, 1997 to explain as to why the proceedings under section 9 of the Prevention of Fragmentation and Consolidation of holdings Act, 1947 should not be initiated against them as well as respondent No.4. The petitioners have also pointed out that the petitioners as well as respondent no.4 also were called upon by respondent no.3 to face the proceedings under sec. 9 of the Fragmentation Act for sale agreement entered into int he year 1974 after a period of about 23 years or so, on 22nd July, 1997. Detailed reply was submitted by petitioner no.2/1 to the said show cause notice mentioning the fact that because of the land acquisition proceedings, the disputed land has remained with the petitioners as well as respondent no.4. It was also mentioned that in view of the circular dated 18th July, 1990, disputed land was exempted from the provisions of the Act and also that as the notice was issued after these many years, notice was bad and illegal and the same was required to be set aside. According to the petitioners, inspite of such a detailed reply submitted by the petitioners, the respondent No.3 has, by order dated 20th October, 1997, without considering the facts and circumstances of the case and also in total disregard to the fact that the provisions of the Act would not apply to the disputed land in view of the proceedings under the Land Acquisition Act as well as under the Urban Land (Ceiling and Regulation) Act, 1976. Against the said order, the petitioners approached the respondent No.2 Additional Secretary (Appeals), Revenue department, Gandhinagar by filing revision application no. 42 of 1997 wherein all the details were given with necessary facts and record. However, the revisional authority has, without considering the facts and details given by the petitioners in their revision application, rejected the revision application and confirmed the order dated 20th October, 1997 by order dated 29th September, 2000.

Considering the record, the Circle Inspector and Deputy Collector, respondent no. 2 has come to the conclusion that the notice under section 6 of the Fragmentation Act was served upon the respondents no.4 and he has also come to the conclusion that the transaction was in breach of the provisions of the Fragmentation Act and on the basis of such consideration,

he has passed the order dated 20th October, 1997 and imposed fine and also directed to remove the unauthorized occupation from the land in question under section 9(3) of the Act. In the proceedings before the revisional authority against the said order dated 20.10.1997, over and above the other contentions on merits, it was specifically pointed out that there was delay in initiating the proceedings under the Fragmentation Act. However, the revisional authority has, without considering the aspect of delay and also without considering the law laid down by this Court and the apex court in series of decisions, has rejected the revision application while confirming the order passed by the Dy. Collector by order dated 28th September, 2000.

In the facts of the present case, one aspect is quite clear and undisputed between the parties. From the record, it is clear that there was registered sale deed for transaction of the land in question between the vendor respondent No. 4 and the vendi petitioners which was entered into between the said parties in the year 1974 on 24.6.1974 which was registered before the sub Registrar, Gandhinagar on 14.6.1978. It is also not in dispute that the the first notice was issued by the deputy collector Gandhinagar on 22.7.1997 for the alleged breach of the provisions of the Fragmentation Act Thus, in respect of the transaction which has taken place in the year 1974 and registered on 14.6.1978, the proceedings were initiated by the concerned authority by issuing show cause notice dated 22.7.1997 i.e. after about 23 years from 4.6.1974 to respondent no.4. Thus, it is clear that the powers were exercised by the concerned authority after more than twenty three years' period under the Fragmentation Act.

Therefore, the matter is required to be examined in light of these undisputed facts. In respect of the contention about exercise of the powers by the authority after unreasonable period, the view of this court in case of Ranchhodbhai Laljibhai Patel versus State of Gujarat reported in 1984 (2) GLR 1225 is relevant. In para 4 of the said decision, this court has observed as under:

> "4. Now, it is obvious that the authorities under the Act have been enjoined to pass proper orders under sec. 9 for declaring the transaction contrary to the said act to be null and void and also to pass consequential orders of fine as well as summary eviction. But the said statutory powers like any other statutory powers have to be exercised within reasonable time. If that concept is kept out, any statutory powers

would be exercised after a number of years or decades. In the meantime, the affected parties would have materially altered their position and irreparable injury would be caused to them and it would be impossible to put the clock back. If such powers can be exercised after unduly long delay. On the peculiar facts of this case, it has got to be held that the power exercised by the concerned authorities under sec. 9 was at grossly belated stage and as there was unreasonable delay in exercise of that power, the the exercise would be ex facie unreasonable, unjust and illegal. It may be recalled that the petitioner purchased a part of the block on 2.1.1967 by a registered sale deed. It is true that ignorance of law is no excuse and merely because the petitioner pleaded that he was ignorant of the legal requirement of obtaining prior permission of the collector, the same cannot stand in good stead to him. Consequently, if the authorities would have been vigilant enough for enforcement of the provisions of the Act and had initiated proceedings under sec. 9 at the earliest, the petitioner would have no defence in such proceedings. But on the facts of the case, the situation is entirely different. The authorities acting under the act did not initiate any proceedings against the petitioner and opponent No.3 for 7 long no of years. In the meantime, the petitioner who had purchased the land for the purpose of putting up a residential house, spent a large amount of Rs.25,000.00 and constructed a residential house with facilities of latrine, bathroom and a store room. It is obvious that when no proceedings were initiated against them for a long time, there could arise a reasonable belief for the petitioner that there was nothing wrong with the sale deed under which he had purchased the land and he had become full owner of the land. He could never have dreamt that after 7 years, he would be presented with a show cause notice under sec. 9. During that time, the petitioner had irretrievably changed his position to his detriment. such an inaction on the part of the authorities exercising powers under the Act for a number of years and waking up ne fine morning after 7 years by issuing notice to the concerned parties for showing cause why the transaction entered into by them should not be declared as null and void, has got to be held, on the facts of this case, to be quite

unreasonable. It is also to be appreciated that the Deputy Collector passed the order of summary eviction against the petitioner in 1974 almost 10 years after the date of the original transaction of 1967. Hence, the exercise of such power would be unjust on the facts of this case. If any authority were needed in support of my conclusion to which I have reached on the facts of the case, it is supplied by the decision of the Supreme Court in Mansaram v. S.P. Pathak and Others (Civil appeal No. 1262 (N) of 1978, decided by D.A. Desai and R.B. Misra, JJ. on 29.9.19830. D.A. Desai, J. speaking for the Supreme Court has made the following pertinent observations;

'Where the power is conferred to effectuate a purpose, it has to be exercised in a reasonable manner and the reasonable exercise of power inheres its exercise within a reasonable time. This is too well established to need buttressing by a precedent. However, one is really available in State of Gujarat v. Patel Raghav Natha and Others (1970) 1 SCR 335.'

It is true that no period of limitation is laid down by the said Act indicating as to within what period, the concerned authorities can initiate proceedings under sec.9. It is also true that power given to the authorities is coupled with duty to act as per the provisions of sec.9 if power under sec.9 can be validly invoked. But that does not mean that power can be exercised at any time may be after years or decades. Exercise of power has to be justified on the facts of each case and if on the facts of a given case, it is found that exercise of power after lapse of sufficiently long period between the impugned transaction and the date of exercise of that power would be arbitrary and unreasonable due to the fact that in the meanwhile parties had changed their position irretrievably obvious of any possibility of future action by the authorities functioning under the act on account of prolonged inaction on the part of these authorities and any attempt to put back the clock would result in irreparable injury to the concerned parties, then such exercise has to be treated to be unjust and illegal. In that view

of the matter, as seen above, on the facts of this case, the exercise of the power under sec.9 against the petitioner would be unreasonable and arbitrary. Only on this short ground and without going into other contentions which are sought to be canvassed by Mr. Sanjanwala in support of the petition, this petition will have to be allowed."

Said question has been examined by this Court on various occasions. In case of Devshibhai Bhimabhai Rabari versus State of Gujarat and others reported in 2001 (2) GLR 1097, this Court has observed that while exercising the powers under section 211 of the Code by the Collector, much delay has been caused in taking the order into revision and, therefore, the order in question has been set aside by this court. Similarly, in case of Ravasinh Ranubha versus V.S. Sinha or his successors and others reported in 2001 GLR 1679, this Court has observed that the limitation of exercise of revisional powers in such a matters is one year which can be considered to be reasonable period for exercise of the revisional powers. Then, in case of Shri Ravindra Darshan Co-op. Housing Society Ltd. versus Prafulkumar Thakar, Secretary, Revenue Department and another reported in 2000(2) GLR 1639, this Court has observed that the powers under section 211 of the Bombay Land Revenue Code was exercised after unreasonable period. It was held that though no period of limitation has been prescribed under section 211 of the Code, this power must be exercised in reasonable time and the length of reasonable time must be determined by the facts of the case and the nature of the order which is being revised, the State cannot keep sword hanging in respect of the property by chosing to act and revise the order at its sweet will which may be after seven years as it was sought to be done in the instant case after more than twenty five years. Similarly, this court has considered the same question in case of Lavjibhai Motiram Prajapati versus State of Gujarat reported in 2000(3) GLH 551 and has observed that when no period of limitation has been prescribed under the Statute, then, the powers must be exercised within reasonable time. The Division Bench of this Court has also considered the question in case of State of Gujarat versus Pravinbhai Bhailalbhai Gor reported in 2000(3) GLR page 2168. In para 5 of the judgment, this Court has observed as under :

"5. We have heard the learned Advocates appearing for the parties. We have examined the facts and circumstances emerging form the record of the present case. One thing is quite certain

and obvious that though the Collector is competent to exercise revisional powers invoking the aids of the provisions of Rule 108(6) of the Gujarat Land Revenue Rules, if he finds that the authority below has committed some illegality or any order recorded by the authority below is unjust or perverse. However, it is settled proposition of law that although no period of limitation for exercise of such revisional is prescribed, it has to be exercised within a reasonable period of time for the simple reason that by passage of time or on advancement of the age of the dispute, the rights of the parties get crystallized and transfers also take place in between the period. The expression 'reasonable period" as such is not statutorily defined. However, reasonable period in a given case would, obviously, depend upon the facts and circumstances of the case and the Court is obliged to consider the relevant facts and circumstances and for determining the expression 'reasonable period' in each case. In the present case, the delay has occurred for more than eight years. Nothing has been successfully shown on behalf of the appellant original respondent. state of Gujarat, as to why the exercise of power under Rule 108(6) of the Rules is not taken in reasonable time or in other words, the reasons for inordinate delay for employing into the service the statutory powers of revision under Rule 108(60 of the Rules. in absence of such reasons, one thing is very clear that the period of delay of about 9 years by no stretch of imagination could be said to be reasonable period. This aspect itself goes to the root of the matter. Since we have found that the Collector has failed to exercise the discretionary power of revision against the impugned order of the revenue authority within a reasonable period, the impugned order of directing of the cancellation of the mutation entry in the name of the original petitioner could not be sustained. since this ground itself is sufficient to throw the appeal over board, it would not be necessary for us to divulge meticulously, at this stage, in this appeal, other aspects which the learned single Judge has gone into while determining the merits of the petition before him. "

Similarly, in case of Parshottambhai Ramjibhai

Rathod versus Dhirajlal Dharamshi Mistry reported in 1999(2) 310, this Court has also observed that the powers of revision exercised by the suo motu revision under section 211 of the Bombay Land Revenue Code does not prescribe limitation does not mean that such power can be exercised at any time but the same has to be exercised within reasonable time. In context of the suo motu powers under section 84C of the Tenancy Act, this Court has also considered in case of State of Gujarat versus Shamraji Chelaji and others reported in 1999 (2) GLH page 917 and has observed that the exercise of the powers under section 84C of the Tenancy Act after a period of four to 11 years has been considered to be unreasonable period as the authority has not been able to justify the delay in taking the action after lapse of four to eleven years.

The question has been considered by the apex court in case of Mohamad Kavi Mohamad Amin versus Fatmabai Ibrahim reported in (1997) 6 SCC 71. In para 2 of the decision, the apex court has held as under:

"2. Although Mr. Bhasme learned counsel appearing for the appellant took a stand that under section 63 of the Act aforesaid, there should not be any discrimination amongst the agriculturists with reference to the State to which such agriculturist belongs. But according to him, even without going into that question, the impugned order can be set aside on the ground that suo motu power has not been exercised within a reasonable time. section 84-C of the Act does not prescribe any time for initiation of the proceedings. But in view of the settled position by several judgments of this court that wherever a power is vested in a statutory authority without prescribing any time limit, such power should be exercised within a reasonable time. IN the present case the transfer took place as early as in the year 1972 and suo motu inquiry was started by the Mamlatdar in September, 1973. If sale deeds are declared to be invalid the appellant is likely to suffer irreparable injury because he has made investments after the aforesaid purchase. In this connection, on behalf of the appellant reliance was placed on a judgment of Justice S.B. Majmudar (as he then was in the High Court of Gujarat) in State of Gujarat v. Jethmal Bhagwandas Shah disposed on 1.3.1990, where in connection with section 84C itself, it was said that the power under the

aforesaid section should be exercised within a reasonable time. This Court in connection with other statutory provisions, in the case of State of Gujarat v. Patil Raghav Natha and in the case of Ram Chand v. Union of India has impressed that where no time limit is prescribed for exercise of a power under a statute, it does not mean that it can be exercised at any time; such power has to be exercised within a reasonable time. We are satisfied that in the facts and circumstances of the present case, the suo motu power under section 84C of the Act was not exercised by the Mamlatdar within a reasonable time. Accordingly, the appeal is allowed. The impugned orders are set aside. No costs."

I have also considered the decisions cited by Ms. Pandit, the learned AGP for the respondent authorities. in case of State of Orissa and others versus Brundaban Sharma and another reported in 1995 Supp 93) Supreme Court Cases 249 wherein, in para 16, the apex court has observed as under:

"16. It is, therefore, settled law that when the revisional power was conferred to effectuate a purpose, it is to be exercised in a reasonable manner which inheres the concept of its exercise within a reasonable time. Absence of limitation is an assurance to exercise the power with caution or circumspection to effectuate the purpose of the Act, or to prevent miscarriage of justice or violation of the provisions of the Act or misuse or abuse of the power by the lower authorities or fraud or suppression. Length of time depends on the factual scenario in a given case. Take a case that patta was obtained fraudulently in collusion with the officers and it comes to the notice of the authorities after a long lapse of time. Does it lie in the mouth of the party to the fraud to plead limitation to get away with the order ? Does the lapse of time an excuse to refrain from exercising the revisional power to unravel fraud and to set it right ? the answers would be no.'[emphasis supplied]

Ms. Pandit has also relied upon the decision in case of Saburbhai Hemabhai Chauhan v. State ate of Gujarat and Ors. reported in 2000(1) GLH 580. Para 12 and 13 of the said decisions are reproduced as under which are relevant in the facts of the present case.

"12. Thus, in the instant case, since the sale deed annexure A is void ab initio, the said sale deed cannot be legalized simply because delayed action was taken. On the facts of the present case, it cannot be said that the authorities were aware of illegal transaction; rather it was a case where sale transaction was concealed and fraud was played upon the authorities. it was only when the record of rights team had gone to the village for inspection that the owners made representation on 12.4.1990 before the Deputy Mamlatdar, Record of Rights and then the sale deed in favour of the petitioner came to light.

13. Breach of condition case no. 22 of 91 on such report was initiated in the year 1991. It is, therefore, difficult to accept the contention that it was a case of delayed action. The disputed land originally was entered in the name of Bai Mani widow of Bhima Rama. The consolidation operations came in the year 1957 and regarding new block no. 7, entry was made that it was a new tenure. Bai Mani expired in the year 1972-73. Thereafter, the names of her nephews Chhatrasinh Hamirsinh and Kohyabhai Hamirsinh were entered as coparceners. Once the entry was made in the life time of Bai Mani that the land was new tenure the entry in the names of the vendors of the petitioner could not be made as coparceners of deceased Bai Mani. This transaction was also rightly considered to be illegal by the authorities. Thereafter, when the sale deed was executed in the year 1974 by the vendors in favour of the petitioner again the petitioner's name was entered as coparcener. The purchaser in no case can be treated as co-parcener hence this entry was made deceitfully. If the sale deed would have been disclosed then the position would have been different. It is, therefore, a case where a fraud was definitely played upon the authorities and the authorities were not aware of the said sale transaction before the Record of Right team had gone to the village for making inspection. For the first time on 12.4.1990, representation was made by the previous owners regarding sale deed and then breach of conditions case no. 42 of 1991 came into existence. As such, if the entry was certified in the year 1980 or 198 under fraud or misrepresentation it cannot be said that

it was delayed action which was taken in 1991. Thus, this ground also cannot be pressed into service for holding the three impugned orders to be illegal and invalid."

I have considered the aforesaid decisions. Now, in the instant case, it is clear that the authority has exercised the powers after a period of 23 years under the provisions of the Fragmentation Act in respect of the transaction of sale of the land in question which was registered before the concerned authority and under the said transaction, the possession of the land in question has already been handed over by the respondents no. 4 to the petitioner in the year 1974 whereas the proceedings were initiated in the year 1997 on 22.7.1997 by issuing the notice. It is, therefore, clear that the powers were exercised after a period of 23 years. As per the observations made by the apex court in case of State of Orissa and others versus Brundaban Sharma and another (supra), when the revisional power was conferred to effectuate a purpose, it is to be exercised in a reasonable manner which inheres the concept of its exercise within a reasonable time. The apex court has also observed that the absence of limitation is an assurance to exercise the power with caution or circumspection to effectuate the purpose of the Act or to prevent miscarriage of justice or violation of the provisions of the Act or misuse or abuse of the power by the lower authorities or fraud or suppression. In the said decision, the apex court has clearly observed that the length of time depends on the factual scenario in a given case. Therefore, the ratio laid down by the apex court in the said decision in case of State of Orissa v. Brundaban (supra) has to be applied in light of the facts of the present case. In the said case, the apex court has clearly observed that the absence of limitation is an assurance to exercise the power with caution or circumspection to effectuate the purpose of the act or to prevent miscarriage of justice. However, in the instant case, it is not the case of the respondent authorities that there was fraud or collusion or misrepresentation before the officers by the concerned party. Therefore, the ratio laid down in the said case has to be appreciated in the facts of the present case. In the instant case, it is not the case of the respondent authorities that there was any misrepresentation or fraud and it is also equally clear that in respect of the transaction of the year 1974 which was registered in the year 1978 on 14.6.1978, whereas the powers were exercised by the authority concerned in the year 1997 by issuing notice for the first time. Therefore, in light of the

facts of the present case, said decision is not helpful to the respondents. Similarly, in case of Saburbhai Hemabhai Chauhan v. State of Gujarat & Ors. (supra) also, any action, transaction, decision or order which is illegal and void ab initio to be treated as non est and validity of such an illegal non est order could be questioned in any proceedings at any stage by anybody and such order does not create any right, title or interest. If the facts of the present case are considered, admittedly, there was no any instrument or registered document in respect of the transaction in question took place in the year 1974 and was registered in the year 1978. Based upon such transaction of sale, possession was handed over to the petitioner by respondent No.4 and necessary entries were made in the revenue record as stated earlier long before and, therefore, the authorities below ought to have considered the aspect of delay in issuing the first show cause in the year 1997 and also while passing the orders impugned in this petition.

While considering the said decision in case of Saburbhai Hemabhai Chauhan (supra), it would be appropriate to consider first the decision of the Full Bench of this Court in case of Jadav prabhatbhai Jethabhai v. Parmar Karsanbhai Dhulabhai reported in 2001(1) wherein the Full bench of this Court has held that the suit for declaration that the order is nullity has to be filed within the period of limitation. In para 22, 23 and 24 of the decision, it has been observed by the Full Bench of this Court as under:

"22. We are of the clear opinion that when the binding decision or authority of the High Court stands even impliedly overruled, either by a decision of Larger Bench or Hon'ble apex Court no reference is necessary to a larger Bench as it is done, in the present case. The proposition of law has been extensively explored and very well expounded and settled in the field of Precedential Jurisprudence. but for the aforesaid special reasons and special circumstances coupled with the fact that the author of the reference has retired long before, we would have not thought it necessary or expedient to deal with and decide to whole appeal on merits making a departure from the usual and regular practice.

23. It becomes, therefore, very clear that the decision of the supreme court in Gurdev Singh

(supra) in which Syed Qamarali's case has been considered and distinguished, is, squarely, attracted to the facts of the present case and the merits of the appeal could be decided on that basis itself. In para 10 of the decision in Gurdev Singh (supra) Qamarali's case (supra) has been specifically referred to and distinguished by giving facts and law elaborately. It has also been clearly observed that the right to sue accrued to Syed Qamarali was brought within the period of limitation. Qamarali's case stands on the different footing and is not relevant.

24. In the present appeal, the issue of limitation is decided against the appellants. It has been clearly found by the trial court that the suit was not brought within the period of limitation. It has been clearly pronounced in para 8 in Gurdev Singh's case that in view of the legal principles, the party aggrieved by the invalidity of the order has to approach the Court for relief of declaration that the order against him is inoperative and not binding upon him. He must approach the Court within the period of limitation. If the statutory time limit expired, the Court cannot give a declaration sought for.

25. The observations in para 6 and 7 are also very relevant and material.

'6. But nonetheless the impugned dismissal order has at least a de facto operation unless and until it is declared to be void or nullity by a competent body or court. In Smith v. East Elloe Rural District Council, 1956 AC 736-769, Lord Radcliffe observed:

'an order even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'

7. Appropos to this principle, Prof. Wade states : "the principle must be

equally true even where the brand of invalidity is plainly visible, for their also the order can effectively be resisted in law only by obtaining the decision of the Court" (See Administration Law, 6th Ed. 350 Prof. Wade sums up these principles;

'the truth of the matter is that the Court will invalidate an order only if the right ready is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case, the 'void' order remain effective and is in reality, valid. It follows that an order may be void for one purpose and valid for another, and that it may be void against one person but valid against an other."

The main observations made by the Full Bench in the aforesaid decision are to the effect that the party aggrieved by the invalidity of the order has to approach the Court within the prescribed period of limitation for the relief of declaration that the order against him is inoperative and not binding upon him. The main observations made by the Full Bench are to the effect that such an aggrieved party has to approach the Court within the prescribed period of limitation and if the period of limitation has already expired, then, the Court cannot give the declaration sought for. That would mean that when limitation has been prescribed, such a party has to approach within that prescribed period of limitation and when the limitation has not been prescribed in law in a particular case, then, it has to approach the Court or has to initiate the action within reasonable period. Therefore, in the facts and circumstances of the case, the period of 23 years in initiating the action cannot be considered to be reasonable period. As per the Full Bench decision of this court in aforesaid decision, the question of limitation and/or reasonable period would certainly come in the way of the respondents for taking action.

The apex court has, in case of State of Kerala

versus M.K.Kunhikannan Nambiar Manjeri Manikoth, naduvil reported in 1996 AIR SCW 301, considered one more aspect that the void orders would be effective inter parties till set aside by the higher forum. In para 6 and 7 of the said decision, it has been observed by the apex court as under:

"6. It is not necessary for us to go into the merits of the case. we are of the view that the order passed inter parties in CRP 3440 of 1977 dated 2.11.1977, has become final, and it concludes the matter. The observations made in the proceedings, at the instance of the lst respondent regarding the validity of the order of the Board, in CRP No. 3696 of 1977, will not in any way affect the legality and validity of the proceedings declining to implead respondents Nos. 3 and 4 or the order passed in revision therefrom - CRP 3440 of 1977. It is true that the proceedings dated 28.6.1977 was observed to be void in law in CRP 3696 of 1977, filed by the first respondent. In our opinion, even a void order of decision rendered between the parties cannot be said to be non existent in all cases and in all situations. Ordinarily, such an order will, in fact, be effective inter parties until it is successfully avoided or challenged in higher forum. Mere use of the word 'void' is not determinative of its legal impact. The word 'void' has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. It can be avoided. There are degrees of invalidity, depending upon the gravity of the infirmity, as to whether it is, fundamental or otherwise and in this case, the only complaint about the initiation of the suo motu proceedings by board was, that, it was not initiated on intimation by the State Land Board about the non filing of the statement as required by section 84(7) of the Kerala Land Reforms Act. In our opinion, this is not a case where the infirmity is fundamental. It is unnecessary to consider the matter further.

7. In Halsbury's Laws of England, 4th Edition (Reissued) Vol.1(1) in para 26, page 31, it is stated thus; -

'If an act or decision, or an order or other instrument is invalid, it should,

in principle, be null and void for all processes; and it has been said that there are no degrees of nullity. Even though such an act is wrong, and lacking in jurisdiction, however, it subsists and remains fully effective unless and until it is set aside by a court of competent jurisdiction, until its validity is challenged, its legality is preserved.'

In the Judicial Review of Administrative Action, De Smith, Woolf and Jowell 1995 Edition age pages 259-260 the law is stated thus;

'The erosion of the distinction between the jurisdictional errors and non jurisdictional errors has, as we have seen, correspondingly, eroded the distinction between void and voidable decisions. The Courts have become increasingly impatient with the distinction to the extent that the situation today can be summarized as follows;

(1) All official decisions are presumed to be valid until set aside or otherwise held to be invalid by a Court of competent jurisdiction.'

Similarly, Wade and Forsyth in Administrative Law, 7th edition, 1994, have stated the law thus at pages 341-342;-

'... every unlawful administrative Act, however, invalid is merely voidable but this is no more than the truism that in most situations the only way to resist unlawful actions is by recourse to the law. In a well known essays, Lord Racliffe said;

' An order, even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. UNless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable

of orders.

This must be equally true even where the brand of invalidity is plainly visible; for there also the order can effectively be resisted in law only by obtaining the decision of the Court. The necessity of recourse to the Court has been pointed out repeatedly in the House of Lords and Privy Council without distinction between patent and latent defects."

The above statement of law supports our view that the order of the Board dated 28.6.1977, declining to implead respondents nos. 3 and 4 "which stood confirmed in revision" concludes the matter against respondents nos. 3 and 4. "

Therefore, in the facts and circumstances of the case, it is ex facie clear that the action has not been taken by the respondent authorities within the reasonable period. Since limitation has not been prescribed in the statute for such action, it was incumbent upon the authorities to initiate action within the reasonable period whereas in the instant case, in respect of the transaction in question relating to the year 1974, the authorities have issued the notice in the year 1997 on 22.7.1997. While considering the case, both the authorities below have ignored this aspect of the matter. The authorities below ought to have considered that if the action or proceedings are not initiated within the reasonable period even for null and void orders, then, in the mean time, the affected party might have materially altered their position and irreparable injury would be caused to them and it would be impossible to put the clock back. Therefore, according to my opinion, in the facts and circumstances of the case and also in view of the decisions cited by Joshi, learned advocate for the petitioner and also in view of the principles laid down by the Full Bench of this Court, the orders impugned in this petition are required to be quashed and set aside. The decisions cited by Ms. Pandit, the learned AGP for the respondent authorities are not applicable in the facts and circumstances of the present case. No other contentions were raised by Ms. Pandit, learned AGP for the respondent authorities.

Therefore, in view of the aforesaid discussion, present petition is allowed. The order passed by the Circle Inspector and the Deputy Collector, Gandhinagar

dated 20th October, 1997 as well as the order passed by the Revisional Authority in revision application dated 29th September, 2000 are quashed and set aside. Rule is made absolute accordingly with no order as to costs.

In view of the order passed in the main petition today, civil application No. 11927 of 2001 shall not survive. Same is, therefore, disposed of as such with no order as to costs.

Dt.5.11.2001. (H.K. Rathod,J.)

Vyas